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No. 86-584

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES TYBERG,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, during the interrogation of a suspect who has been properly admonished and has voluntarily waived his Miranda rights, officers may constitutionally employ non-coercive psychological tactics such as ingratiation or nonspecific offers of aid or misstatements of facts to assist in securing truthful confessions?

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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v.

CHARLES TYBERG,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three.

entered on June 18, 1986. A petition for rehearing was denied on July 11, 1986. Review by the California Supreme Court was denied on September 11, 1986. The remittitur was issued on September 17, 1986

OPINIONS BELOW[1]/

The opinion of the California Court of Appeal, reversing the judgment

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1. The Court of Appeal opinion in this case was not published and pursuant to California Rules of Court, rule 977 cannot be relied on by a court or party in any other action or proceeding. While the opinion is unpublished its effect on the practices of law enforcement is significant. It is one of the purposes of appellate court opinions, whether published or not to educate police officers concerning the legality of their practices. The power of the instant opinion in that regard is great since, given the crime committed, the murder of a police officer, the law enforcement community has scrutinized the opinion with particular care.

(People v. Charles Tyberg, G001507) appears as Appendix A to this petition. A copy of the California Supreme Court's order denying review without opinion appears as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal was filed on June 18, 1986. A timely petition for rehearing was denied on July 11, 1986 and a timely petition for review in the California Supreme Court was denied on September 11, 1986. This petition is filed within 60-days of the denial of petitioner's request for review in the California Supreme Court and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments 5 and 14.

STATEMENT OF THE CASE

On June 22, 1983, the District Attorney of San Diego County filed a one count information charging respondent Charles Tyberg with murder in violation of Penal Code section 187. In addition, the information alleged the use of a firearm within the meaning of Penal Code section 12022.5 (CT 1.)

Trial by jury commenced on October 4, 1983. (CT 123.) On October 12, 1983, respondent was found guilty of murder in the first degree and it was found true that respondent had personally used a firearm within the meaning of Penal Code section 12022.5. (CT 134-135.)

On March 5, 1984, respondent was sentenced to state prison for the term of 27 years to life. (CT 235-236.) Notice of appeal was filed on March 5, 1984. (CT 240-241.) On June 18, 1986, the

judgment was reversed and on July 11, 1986, rehearing was denied. On September 11, 1986, review was denied by the California Supreme Court.

STATEMENT OF FACTS[2/]

A. The Murder of Officer Kirk Johnson

In February of 1983, respondent, 16-year-old Charles Tyberg, was living with his family at their house in the Mission Hills section of San Diego. Respondent's stepfather, a sergeant in the San Diego County Sheriff's Department, was assigned a marked patrol vehicle which he kept at home when off duty. (App. A, 2-3.)

The Tyberg family made plans to spend the weekend of February 19-20 in

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2. The page references included in the statement of facts refer to the transcript from trial and the transcript of Mr. Tyberg's confession made an exhibit at trial.

Mexico. Respondent begged off claiming the need to continue working at a job. In fact, respondent had other more sinister intentions; intentions that could only be carried out in the absence of his family. It was Charles Tyberg's plan to take his stepfather's patrol car and, using the vehicle's lights and siren, stop drivers, rob them and, if need be, shoot them. (RT 365-366, 377.)

On the afternoon of Saturday, February 19, 1983, respondent invited 15-year-old Todd Boyce to his home, explaining his family was out of town and the two could watch television and later go out in his stepfather's patrol car. (RT 273-275.)

The two went to the Tyberg home and watched television. At approximately 8:00 p.m. another friend, Mike Holar,

arrived. Respondent showed Todd and Mike his father's .357 magnum, .38 caliber and .22 caliber pistols. During the evening, the three talked about going out in the patrol car. It was agreed the trio would take the guns, leave after midnight, stop cars and rob the drivers. (RT 275-286.)

As midnight approached, respondent put on his stepfather's shirt, badge, gun belt and .357 magnum service revolver. Todd took the .38 revolver, and Mike, the .22 caliber semi-automatic. The three got into the sheriff's car, respondent in the driver's seat, Mike Holar beside him, Todd Boyce in the rear. (RT 286-289.)

After driving to several locations, and without stopping anyone, respondent and his friends drove into the dark and secluded parking lot of Marion

Bear Park in San Diego. Respondent stopped in the middle of the parking area with the patrol car pointing toward the exit. The trio left the car, fired at rabbits with Todd's B-B gun, and eventually returned to the sheriff's vehicle. (RT 289-295.)

As the three looked at a map, they discussed plans for stopping cars. Respondent again stated his intention to use the patrol car to stop vehicles and rob the occupants. He suggested that if anyone resisted, Mike should shoot them. (RT 295-296.)

As the friends talked and consulted the map, a marked San Diego Police car driven by Officer Kirk Johnson turned off the roadway and drove with its lights out toward where the boys were sitting. (RT 296-297.)

Respondent saw the car approaching and stated, "Oh No . . . Oh Shit." Respondent drew the .357 magnum revolver from its holster and placed it on the seat. He was uncertain what the officer would do and wanted to get "ready for it." As the officer's car approached, respondent cocked the revolver's hammer. Mike Holar stated to respondent, "No. You can't shoot him." (RT 297-302.)

Unaware of the danger, Officer Johnson took no action to protect himself. As Johnson aligned his open driver's window within feet of the open driver's window of respondent's car, the officer apparently realized that something was very wrong. Noticing this, respondent raised his revolver, grasped it in both hands in a combat position, aimed at the officer's head and neck and fired one

shot and then another. The officer's body jerked and slumped over the steering wheel. Mike Holar said to respondent, "Don't shoot him, don't shoot him, he's dead enough." Respondent then fired four more times; then pulled the trigger twice more, dropping the hammer on expended cartridges. (RT 249, 302-305, 349-352.)

Respondent drove from the parking lot and eventually returned home. On arrival the boys were met by another friend, David Franklin. David asked what they had done. Respondent replied he had done something that would make him famous. At first respondent resisted David's request for a further explanation. Finally, however, he stated he had shot a "cop." David asked why; respondent replied because he did not want to get into trouble. (RT 366-380.)

B. The Investigation

When Officer Johnson could not be contacted by radio, a search was undertaken by the police department. The dying officer was eventually found slumped over the steering wheel of his car; the vehicle's engine still running. Johnson was taken to a hospital where he died from five gunshot wounds to his neck and chest. (RT 189-213, 221-224.)

The police investigation initally produced little physical evidence. The five bullets were taken from Johnson's body. A disturbing discovery was that tire tracks found next to Johnson's car had been made by a high-speed tire, used primarily by law enforcement agencies. The pattern of tracks in the lot indicated the vehicle bearing these tires was the last to leave the area before the officer was discovered.

The pattern of tracks, the condition of Johnson's car, and the implication arising from the setting led the investigators to believe Johnson had met someone in the park whose appearance had caused him to lower his guard. (RT 240-249.)

On March 26, 1983, Mike Holar appeared at police headquarters and made a statement implicating respondent in the murder of Officer Johnson. Based on this information, the police arrested respondent and seized his stepfather's .357 magnum revolver and patrol car. Tests were conducted and it was determined the bullets taken from Officer Johnson's body had been fired by Sergeant Tyberg's service revolver. (RT 250-251, 256-262, 360-361.)

C. The Confession

Respondent was arrested at his home. He was advised of his Miranda

rights both at the time of his arrest and again later at police headquarters. Respondent waived his rights. At first, respondent denied any knowledge of the crime. The interrogating officers told respondent that from what they had heard, the shooting of the officer had been "a crazy, spontaneous thing." They then truthfully explained that they had information that respondent was responsible for the killing. (RT 38-40.)

San Diego Police Detective Ronald Newman then stated to appellant:

> "Charlie, we've been talking to some people that, that say that you have been down there, okay, and I don't necessarily want to frighten you a whole bunch Charlie, but some people are telling us some things that happened down there in the park in reference to the police officer. Okay, it's like my big concern is Charlie that because of all the publicity that the case has been

getting, it's just going to scare you to a point to where you're going to withdraw in a shell, and from the things that these other people are telling us, how the police officer got shot, ah, it seems like it was just a crazy spontaneous thing, I mean that it just plain happened. Okay. Now Paul and I have been working on the case along with several other people for a long time and ah, we found out some information since we've been working the case, some people tell us that that, you're responsible for this thing. Our main concern Charlie is that we're concerned about you first of all, ah, and that this case get resolved in some fashion, but more than anything else we want to know what was on your mind when this thing happened.

"It was a crazy act and you're old enough to understand that, but that doesn't mean that ah, that we don't have enough compassion when we're talking to somebody to understand why it happened, okay Charlie, and the hardest thing that we have to deal with as police officers is to sit in a room like this and we've done this for a long time, is to sit in a room like this and develop some raport [sic] with somebody in a short period of time, and I would like us to become

friends for both of, us, for Paul and me both to become friends with you, weren't not [sic] here to ridicule you okay, and we're not going to make fun of you for what happened, and we're not going to treat you badly, but what we do want to understand more than anything else is what was on your mind when this thing happened.

"Okay, we've talked to your friends, they've told us that it just appeared to he [sic] a crazy spontaneous thing that happened just like that, it wasn't planned, when we go out there and we view the crime scene, when Paul and I are out there looking, it almost looks like this thing was planned, like somebody really wanted to kill that cop, but yet when we talk to your friends, about how this thing happened, apparently it was not planned, and what we need to know from you is why in your mind did this thing happen. What was it, that, you know, that, that caused you to do something like that. Ah, and I'd like to have you tell us about that Charlie." (App. A, 8-11.)

Respondent still denied involvement. The officers repeated their

belief the crime had not been planned and their need to understand appellant's state of mind when the shots were fired. Officer Newman stated to appellant:

> ". . . But we're here to help ya, and I mean we're here to try to understand how this thing happened. We, we want to hear it from you what was on your mind. Do you understand that Charlie. Have you got any questions about that, please, I want, I want, impress upon you that we're not here, we're not here to ridicule you, we're not going to beat you up, none of those things are going to happen. We're here to understand uh, why it happened, but we need to hear it from you, okay. And obviously your father's here, and we've got your father's gun and we got the car, we've got all those things, and you have to know that we know our business and that we'd be able to match up those tire tracks that are out there, all those things, and you know you guys were out driving that car, it was a silly thing to do, but that's all it was, I mean you guys took the car, and you know, I can understand why kids would do that, I, I fully understand that, like I said

> I've got a daughter that's exactly your age and I can see why, why they would do something crazy like that, we get, when an officer pulls into that lot like that you know there's something else happened, I mean something triggered it and I need to hear, Paul and I both need to hear it from you, what it was that was on your mind when that happened. Were you just scared to death all of a sudden. I mean did, did, did it scare you so bad you didn't know what else to do." (App. A, 11-13.)

At 7:51 a.m. respondent confessed the shooting of Officer Johnson, but denied the crime was planned. Officer Johnson asked respondent if he felt better having gotten the matter off his chest. Respondent stated he did, and inquired what would happen to him when he went to court. Johnson explained respondent would be placed in Juvenile Hall pending resolution of the case. Respondent asked if he could be kept at

home by his father; Newman stated he did not believe that possible; explained a little more about the processing procedures and then began questioning respondent concerning the details of the crime. (RT 406-425.)

D. Defense

Respondent presented no evidence. He argued that while he had killed Officer Johnson and while the crime was carried out with malice, he did not premeditate and deliberate the death of the police officer.

HOW THE FEDERAL QUESTION IS PRESENTED

In the trial court the respondant contested the voluntariness of his confession based upon the United States Constitution. The trial court found the confession voluntary. The Court of Appeal reviewed the voluntariness of

respondent's confession and based on the United States Constitution found the confession to be involuntary.

REASONS FOR GRANTING THE WRIT

Like all constitutional questions, the issue of whether strategies and psychological tactics may be utilized during interrogations is one involving legitimate but complex and competing societal interests. On the one hand is the concern that interrogations not be oppressive and a suspect's will not be overborne; on the other hand is society's interest in the complete investigation of criminal activity. With regard to the use of psychological interrogation tactics, this Court has never fully explored the balancing of these interests.

Guidance from this Court is required. It is the position of petitioner that psychological tactics are

not inherently coercive. That the use of psychologically oriented techniques are not improper merely because they result in a suspect changing his mind and confessing. However, while such tactics are often employed by police officers, courts and commentators have taken widely divergent positions on their propriety. Some courts, exemplified in the extreme by the California Court of Appeal opinion in this case, decry the use of such tactics, while other courts recognize that an interrogation is essentially an exercise in psychology and allows such tactics. It is important for citizens, courts and police officers that this dispute be explored and the relationship between constitutionally voluntary statements and psychological interrogation tactics be resolved.

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ARGUMENT

AMBIGUITY AND UNCERTAINTY EXISTS CONCERNING THE UTILIZATION OF PSYCHOLOGICAL INTERROGATION TECHNIQUES AND THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE QUESTION

The question of whether officers during interrogations may constitutionally utilize psychological tactics, e.g., the use of false information, false ingratiation, nonspecific offers of aid, etc., to assist in securing truthful confessions is an appropriate and important one for review for this Court. The use of such tactics is widespread and effective. (See White, Police Trickery in Inducing Confessions, (1978) 127 University of Pennsylvania Law Review pp. 581-583; note, Police Use of Trickery as an Interrogation Technique (1979) 32 Vanderbilt Law Review pp. 1167, 1189-1190.) It is petitioner's position

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that the lawful purpose of an interrogation is not merely to give an opportunity to a suspect to make a statement but to allow the police to create a setting and to utilize methods that, after a suspect has been admonished and waived his rights, reasonably assist in securing a truthful and voluntary statement. In the present case the California Court of Appeal clearly holds to the contrary.

While it appears that in general such tactics have been accepted by the courts (see, Ringel, Searches and Seizures, Arrests and Confessions, (2d Edition 1985) § 25.2(d) pp. 25-14.1-25.20)[3/] serious criticism has been

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3. The California cases with regard to deceptive tactics demonstrate the point. The California cases, in line with national authority, hold that a subterfuge based on the use by the interrogator of false information is not a form of coercion unless the deception is

voiced, however, both by commentators and by some courts. (See, e.g., White, Police Trickery in Inducing Confessions, supra, 127 University of Pennslyvania Law Review, pp. 581, 581-583, note, Police Use of Trickery as an Interrogation Technique 32 Vanderbilt Law Review pp. 1167, 1189-1190, note Deceptive Interrogation Techniques and the Relinquishment of Constutional Rights, (1978) 10 Rutgers Camden Law Journal pp. 109-147; Robinson v. Smith (1978) 451 F.Supp. 1278 1291-1296; People v. Tyberg (attached as Appendix A); see also dissenting opinions

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Footnote 3 continued:

likely to produce an untrue statement. (See cases collected in People v. Felix (1977) 72 Cal.App.3d 879, 885-886; see also In re Joe R. (1980) 27 Cal.3d 496, 515; In re Walker (1974) 10 Cal.3d 764, 777-778; People v. Arguello (1967) 65 Cal.2d 768, 775; People v. Parrison (1982) 137 Cal.App.3d 529, 537.)

in Miller v. Fenton (3rd Cir. 1986) ___ F.2d ____ (filed June 26, 1986, 83-5530); State v. Miller (1978) 388 A.2d 218, 226-239.)

The controversy and ambiguity concerning the use of psychological interrogation tactics arise from a number of sources. One problem is the sheer complexity of dealing with issues such as free will, coercion, voluntariness. (See, Grano, Voluntariness, Free Will and The Law of Confessions (1979) 65 Virginia Law Review, pp. 859-945.) Another problem is the conflict between society's desire to avoid oppressive police tactics that overbear individual will and the almost intuitive recognition that it is proper, after a suspect has been informed of and waived his rights, to conduct an interrogation designed to elicit statements that may be highly

damaging to the suspect and that he may not initially wish to make. (Grano, Voluntariness, Free Will and The Law of Confessions, supra, 65 Virginia Law Review at pp. 889-890, 896-898.) A third source contributing to the controversy and ambiguity in this area, and clearly arising from the factors above, are this Court's opinions that have skirted but never dealt directly with the issue of psychological interrogation tactics. (See Ringel, Searches and Seizures, Arrests and Confessions, supra, 2d Ed.1985 § 25.2(d) pp. 25-14.1-25-16)

This Court has stated,

> "[T]he line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgment as to the effect of psychologically coercive pressures and inducements

> on the mind and will of the accused." (Haynes v. Washington (1963) 373 U.S. 503, 515.)

This Court in dicta has appeared to criticize the use of certain psychological tactics (Miranda v. Arizona (1966) 384 U.S. 436, 449-455, 476) but made the point in Rhode Island v. Innis (1984) 46 U.S. 291-300 that, "'Interrogation,' as conceptualized in the Miranda opinion must reflect a measure of compulsion above and beyond that inherent in custody itself." (emphasis added.)

This Court has held that involuntary confessions may result from psychological as well as physical coercion. (see, e.g., Blackburn v. Alabama (1960) 361 U.S. 199, 206.) This Court has dealt with cases where psychological tactics like those discussed in this petition were utilized. While discussing

these tactics as part of the "totality of the circumstances" to be considered in determining involuntariness the court has not specifically decided the propriety or given guidelines for their use. (See, e.g., Spano v. New York (1959) 360 U.S. 315; Leyra v. Denno (1954) 347 U.S. 556; Frazier v. Cupp (1969) 394 U.S. 731.)

That such guidance is required can be illustrated by comparing the facts and analysis in the present case concerning the use of psychological tactics to the facts and anyalysis undertaken in what may be called the Miller trilogy.

The Miller case arose in 1973 from a New Jersey murder. Mr. Miller was taken into custody, was advised of and then waived his Miranda rights. The interrogating officer made no threats and engaged in no physical coercion. Throughout the interview the officer

assumed a friendly, understanding manner, spoke in a soft tone of voice and repeatedly assured Miller that he was sympathetic to him and wanted to help Miller unburden his mind. The officer also provided Miller certain factual information, some of which was untrue. The officer's major theme during the one hour interrogation was that whoever had committed heinous murder had mental problems and was desperately in need of psychological treatment. Early on, the officer made clear to Miller that he believed Miller was guilty and that Miller needed a friend to whom he could unburden himself. The officer stated several times Miller was not a criminal who should be punished but a sick individual who should receive help. The officer assured Miller he was sincerely understanding and wished to help Miller

with his problem. Miller at first denied involvement but later during the interrogation confessed. Miller then collapsed in a state of shock. (Miller v. Fenton (3rd Cir. 1986) ___ F.2d _____, (filed June 26, 1986, 83-5530); State v. Miller (1978) 388 A.2d 218, 220-221, 228-234.)

Over objection, Miller's confession was admitted at trial. A three judge panel of the New Jersey Superior Court, Appellate Division, reversed holding the confession involuntary based on undue psychological pressure. (See State v. Miller, supra, at pp. 226-234.) The New Jersey Supreme Court in a 4 to 3 decision, reversed the appellate division and reinstated the conviction. (Id.)

The New Jersey Supreme Court made these pertinent observations: the court first cited with approval the

observation by the New Jersey trial court that an interrogating police officer is not limited to asking a suspect if he commited the crime and if he receives a negative answer, must then end the questioning. The court noted the natural reluctance of many suspects to confess and noted efforts to dissipate such reluctance and persuade the person to talk are proper as long as the suspect's will is not overborne. The court conceded that the use of psychological interrogation tactics moved into a "shadowy area" and if carried to excess in time and persistance could cross the intangible line and become improper. The court found under the facts of the Miller case that this had not occurred. The court also rejected any claim that the

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confession was the product of impermissible promises of aid. (State v. Miller, supra, 388 A.2d at pp. 223-226.)

After federal habeas, on appeal, the United States Court of Appeals for the Third District reviewed the psychological aspects of Miller's confession and by a vote of 2 to 1 held the confession voluntary. The court found it was often difficult to draw a distinction between proper and improper psychological interrogation tactics but found in the Miller case the suspect's will had not been overborne. The dissent strongly disagreed. (Miller v. Fenton, supra, ____ F.2d _____, 83-5530.)

In the present case, 16-year-old Charles Tyberg was arrested, admonished, taken to police headquarters and then readmonished. Mr. Tyberg waived his rights. At first Mr. Tyberg denied any

knowledge of the murder of Officer Johnson. The officer truthfully told Tyberg that Tyberg had been implicated in the crime. The officers told Tyberg they were afraid because of the publicity the case had received, Tyberg would draw into a shell. The officers explained that from what witnesses had told them the shooting was, "just a crazy spontaneous thing." It does not appear, however, that the officers were fully convinced of this. The officers expressed concern for Tyberg and stated they wanted to know what was going on in his mind at the time of the shooting. The officers stated they wanted to be friends with Tyberg and that, ". . . we're here to help ya and I mean were here to try to understand what happened." Tyberg confessed to the crime. (See App. A, 11-12.) The interrogation in the present case was not prolonged.

Tyberg had been in contact with the police in the past; had been admonished several times in the past and on one occasion had invoked his Miranda rights. (See RT 26-36.)

The California Court of Appeal found the officers' friendly, ingratiating tactics an inpermissible form of psychological "softening up" that alone required the confession be found involuntary. The court, in addition, found the officers' statements concerning helping Tyberg, Tyberg's age and the fact that he was the stepson of a police officer all contributed to the nonvoluntary nature of his confession. (App. A, 25-27.)

The startling differences between the analysis undertaken and the conclusions reached in the Miller cases with those in the Tyberg case cannot be explained on the basis of distinguishable

facts. The differences reveal a fundamental disagreement concerning the manner in which psychological tactics are viewed. It appears the California Court of Appeal assumes that no strategies, deceptions, psychological ploys or insincerities may be employed in interrogating a suspect. The Miller cases reveal, on the other hand, the attitude that an interrogation need not be a sterile, non-probing, unplanned brief request for information. The whole basis for the requirement of an admonition and waiver is that what will follow is not a mere questioning but an interrogation.

It is important that in light of the diversity of opinion that this Court establish guidelines for the manner in which psychological interrogation tactics may be utilized.

* * * * *

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the writ of certiorari to review the decision of the California Court of Appeal be granted.

Respectfully submitted,

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9/22/86

APPENDIX A

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner and Respondent,

v.

CHARLES TYBERG,

Defendant and Appellant.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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APPENDIX A

[Filed June 18, 1986]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	G001507
	)	(Super. Ct. No. C-52342)
Plaintiff and Respondent,	)	OPINION
v.	)	
CHARLES TYBERG,	)	
Defendant and Appellant.	)	

APPEAL from a judgment of the Superior Court of Orange County. Myron S. Brown, Judge. Reversed.

Appellate Defenders, Inc., and Paul Bell, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Jay M. Bloom and John W. Carney, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Charles Tyberg, of first degree murder (Pen. Code, § 187) with use of a firearm (Pen. Code, § 12022.5). On appeal he claims the trial court erred in refusing to suppress in its entirety his confession to the police since it was involuntary and obtained in violation of the rules set forth in Miranda v. Arizona (1966) 384 U.S. 436.

On Saturday afternoon, February 19, 1983, the 16-year-old defendant invited 15-year-old Todd Boyce to his home. Defendant's father, who is a Sergeant with the San Diego County Sheriff's Office, was out of town. The boys watched television and were joined by another friend, Mike Holar, around 8 p.m. Defendant showed Todd and Mike his father's .357 magnum and .38 and .22 caliber pistols. The three discussed

going out in Sergeant Tyberg's patrol car, which they decided to do around midnight. Defendant and Mike talked about pulling people over with the patrol lights and robbing them. Defendant said they should carry guns and, if someone they stopped resisted arrest, one of them would shoot him. Mike responded that he did not want to shoot anyone and the subject was dropped.

Later, defendant put on his father's uniform shirt and took his father's .357 magnum. Todd took the .38 revolver and Mike the .22 semiautomatic pistol. The three then got in the patrol car and left with defendant driving, Mike in the front passenger seat, and Todd in the rear.

After driving around somewhat aimlessly, speeding, and unsuccessfully trying to get the light bar on the car's

roof to work, the boys drove to Marian Bear Park, where defendant stopped the car in the middle of the parking lot facing the exit. The trio left the car, shot at rabbits with Todd's BB gun for awhile, and then returned to their former positions in the car. Once inside the car, defendant said, "Why don't we pull someone over and rob them." He added they would use the patrol lights to pull them over and Mike would shoot anyone who resisted.

While sitting in the patrol vehicle, defendant noticed a police car and stated he hoped it didn't turn into the park. Officer Johnson drove the police vehicle into the park with his lights out and pulled alongside the sheriff's car, with the windows rolled down. As the police car approached, defendant pulled back the hammer of the

gun, shot twice at the police officer, then paused. During the pause Mike said, "Don't shoot him, don't shoot him, he's dead enough." Defendant fired four more shots, started the car, and told Mike to reload the .357 magnum. He appeared shaken and drove on the wrong side of the street as he left the park.

When the boys returned to defendant's house, they were met by another friend, David Franklin. Defendant told David he did something that will make him famous. At first he refused to say what he had done; but at David's urging, he eventually said he shot a cop because he didn't want to get in trouble.

Officer Johnson was found and taken to a hospital, where he was pronounced dead as a result of five gunshot wounds. The bullets were removed. The

tire tracks in the gravel parking lot where the shooting occurred indicated a law enforecment or military vehicle was involved; however, there were few other leads. The first break in the case occurred more than a month later on March 26, 1983, when Mike Holar went to the police with information which led to defendant's arrest.

At 6:15 a.m. on March 27, 1983, Sergeant James Tyberg was interviewed at the Santee Sheriff's substation. The police seized his .357 magnum revolver and patrol car.[1]

Sergeant Tyberg then took the police to his home and woke up Charles saying, "Wake up, Charles, these men want to talk to you." Defendant was advised

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1. From tests conducted it was determined the bullets taken from Officer Johnson's body had been fired by Sergeant Tyberg's service revolver.

of his constitutional rights, but not questioned while at home. He was then taken to the police station and turned over to Detective Ron Newman.

Newman began interviewing defendant in an office adjacent to the homicide division at 7:30 a.m. Detective Olson was present and the interview was recorded.[2/]

After a few background questions, Newman again advised defendant of his constitutional rights. During the advisement defendant asked, "Yeah, are you questioning me now?" Newman replied, "I will as soon as I read you these, your

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2. The tape recorder was located in an adjacent office, where Lieutenant Paul Ybarrondo, who was supervising the investigation, Assistant District Attorney Richard Huffman, Deputy Chief of Police O'Brien, and various other investigators and prosecutors were present.

rights." After Newman completed the rights defendant said he understood them and, "Yeah," he was willing to talk.

Defendant initially denied ever being in San Clemente Canyon Park. Newman then said: "Charlie, we've been talking to some people that, that say that you have been down there, okay, and I don't necessarily want to frighten you a whole bunch Charlie, but some people are telling us some things that happened down there in the park in reference to the police officer. Okay, it's like, my big concern is Charlie that because of all the publicity that the case has been getting, it's just going to scare you to a point to where you're going to withdraw in a shell, and from the things that these other people are telling us, how the police officer got shot, ah, it seems like it was just a crazy spontaneous

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thing, I mean that it just plain happened. Okay. Now Paul and I have been working on the case, along with several other people for a long time and ah, we found out some information since we've been working the case, some people tell us that that, you're responsible for this thing. Our main concern Charlie is that we're concerned about you first of all, ah, and that this case get resolved in some fashion, but more than anything else we want to know what was on your mind when this thing happened. [¶] It was a crazy act and you're old enough to understand that, but that doesn't mean that ah, that we don't have enough compassion when we're talking to somebody to understand why it happened, okay Charlie, and the hardest thing that we have to deal with as police officers is to sit in a room like this and we've done this for

a long time, is to sit in a room like this and develop some raport [sic] with somebody in a short period of time, and I would like us to become friends for both of, us, for Paul and me both to become friends with you, weren't [sic] not here to ridicul [sic] you okay, and we're not going to make fun of you for what happened, and we're not going to treat you badly, but what we do want to understand more than anything else is what was on your mind when this thing happened. [¶] Okay, we've talked to your friends, they've told us that it just appeared to be a crazy spontaneous thing that happened just like that, it wasn't planned, when we go out there and we view the crime scene, when Paul and I are out there looking, it almost looks like this thing was planned, like somebody really wanted to kill that cop, but yet when we

talk to your friends, about how this thing happened, apparently it was not planned, and what we need to know from you is why in your mind did this thing happen. What was it, that, you know, that, that caused you to do something like that. Ah, and I'd like to have you tell us about that Charlie."

The defendant still denied any involvement. Newman then stated, "I don't think that you're the kind of person that would go out and do that to somebody on a daily basis. I think this is the first time that something like this has ever happened with you. I think that you just got caught up into a situation that you didn't know how to handle and it just happened like that. It wasn't something that was planned, but I need to have you tell me about that, . . . I know that your poor little heart's

going to be pounding right outside your chest right now, okay. But we're here to help ya, and I mean we're here to try to understand how this thing happened. We, we want to hear it from you what was on your mind. Do you understand that Charlie [?] Have you got any questions about that, please, I want, I want, impress upon you that we're not here, we're not here to ridicule you, we're not going to beat you up, none of those things are going to happen. We're here to understand uh, why it happened, but we need to hear it from you, okay. And obviously your father's here, and we've got your father's gun and we got the car, we've got all those things, and you have to know that we know our business and that we'd be able to match up those tire tracks that are out there, all those things, and you know you guys were out

driving that car, it was a silly thing to do, but that's all it was, I mean you guys took the car and you know, I can understand why kids would do that, I, I fully understand that, like I said I've got a daughter that's exactly your age and I can see why, why they would do something crazy like that, we get, when an officer pulls into that lot like that you know there's something else happened, I mean something triggered it and I need to hear. Paul and I both need to hear it form you, what it was that was on your mind when that happened. Were you just scared to death all of a sudden. I mean did, did, did it scare you so bad you didn't know what else to do."

The defendant then told the police: "Well, I didn't want it, I didn't know what happened if I got caught, and and it would happen so fast,

that I didn't have time to think because, he came around the corner 25 to 35 miles an hour, he just pulled in there, without lights on or anything like he was trying to catch somebody in the act or something. [¶] . . . [¶] I didn't know what to do, so I opened fire." He denied the shooting of Officer Johnson was planned. The investigators then obtained the additional details surrounding the incident.

During the questioning Newman left the interview room to get a second tape recorder. When Newman returned to the interview room, he told the defendant he wanted to tape record his statement of what happened that night (pretending he had not been doing so). Newman readvised defendant of his constitutional rights. When asked if he was willing to talk, Charles responded, "Ah, ah, I think I better get a lawyer." Newman asked

". . . have we made you any promises tonight at all to get you to talk about this?" Defendant replied, "Ah, you said you was going to help me." The interrogation concluded at 9:05 a.m. At 8:33 a.m. Attorney Richard Songer had called the San Diego Police Department and notified them he had been contacted by defendant's parents to talk with the minor before he made any statements. The trial court suppressed all statements made by defendant after Songer's call was received by police communications. (See Moran v. Burbine (1986) ____ U.S. ____ [89 L.Ed.2d 410, 106 S.Ct. 1135].) Defendant attacks the admission of his March 27, 1983, statement to the police on two grounds: he asserts his statement was involuntary, and it was obtained in violation of the standards required by Miranda v. Arizona, supra, 384 U.S. 436.

He further contends since the statement constituted a confession, its erroneous admission requires automatic reversal (citing People v. Disbrow (1976) 16 Cal.3d 101, 115-116). We agree defendant's statement was involuntary and reverse the judgment.[3/]

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3. Both parties treat defendant's statement to the police as a complete confession to first degree murder. We agree, but feel this point deserves a brief comment.

A confession is a declaration of defendant's intentional participation in a criminal act and must encompass all elements of the crime. (People v. Murtishaw (1981) 29 Cal.3d 733, 756.) "[A]n admission is merely the recital of facts tending to establish guilt when considered with the remaining evidence in the case. [Citations.]" (People v. McClary (1977) 20 Cal.3d 218, 230; see also People v. Murtishaw, supra, 29 Cal.3d at p. 756.) Different standards of reversible error apply to confessions and admissions. The erroneous admission of a confession is reversible per se, while the improper introduction of an admission is not reversible if the People can show beyond a reasonable doubt that

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On review, an appellate court must examine the uncontradicted facts to determine independently whether the trial

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Footnote 3 continued:

the error complained of did not contribute to the verdict. (People v. Murtishaw, supra, 29 Cal.3d at p. 756; People v. McClary, supra, 20 Cal.3d at p. 230, citing Chapman v. California (1967) 386 U.S. 18, 23-24.)

In his taped statement to the police, defendant admitted shooting Officer Johnson. He stated that when he saw the police car before it came into the parking lot, he removed the gun from the holster and laid it on the seat next to him. When the officer pulled into the parking lot, defendant said, "Oh no" and "Oh shit." He "figured [he had] better do something," so he "picked up the gun and started getting ready for it." When the officer's car was a couple of feet away, defendant "pulled the hammer back and got ready." He shot Johnson from a distance of about four feet when the officer pulled up next to him. Defendant fired one shot and Officer Johnson jerked; he then aimed a the officer and fired five more shots. This statement describes a "willful, deliberate, and premediated killing," thus including all the elements of first degree murder. (Pen. Code §§ 187, 189.) At no time did defendant claim legal

court properly concluded that a confession was voluntary. (People v. Jimenez (1978) 21 Cal.3d 595, 609; see

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Footnote 3 continued:

We note defendant's statement also contained a number of comments implying he acted out of panic and confusion (e.g., "I just had visions going by my head so fast that I didn't know what to do. . ."). However, these mitigating remarks do not negate the fact that defendant admitted facts which constituted a full confession to first degree murder. Furthermore, the comments, which were obviously made to place defendant in the best light possible, were encouraged and, in a sense, "set up" by the very police conduct which rendered defendant's statements involuntary. (See discussion below.) In their over-zealous attempt to get defendant to confess by appearing to minimize the significance of his actions, the police told him such things as from what others said the incident appeared to be just "a crazy spontaneous thing" that just happened and was not planned. Officer Newman told defendant, "I think that you just got caught up into a situation that you didn't know how to handle and it just happened like that."

also People v. Murtishaw, supra, 29 Cal.3d at p. 753; People v. Adams (1983) 143 Cal.App.3d 970, 984.) "In determining the question of the voluntariness

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Footnote 3 continued:

Finally, even if defendant's statement to the police were deemed an "admission," we cannot say beyond a reasonable doubt its use at trial did not contribute to the verdict. We question whether it could ever be said that introduction of a defendant's statement, in which he acknowledges facts establishing all the elements of first degree murder, beyond a reasonable doubt did not contribute to his conviction. Here, the only issue to be determined was the degree of defendant's criminal responsibility. The police told defendant, "what we do want to understand more than any thing else is what was on your mind when this thing happened." Defendant's subsequent statement to the police contained damaging detail of his mental state and actions which only he could and did provide. Additionally, in her argument to the jury urging a conviction for first degree murder, the prosecutor relied extensively on defendant's statement to prove his state of mind.

of appellant's statements, this court is required to consider the entire record below. (Davis v. North Carolina (1966) 384 U.S. 737, 741-742 [16 L.Ed.2d 895, 898, 86 S.Ct. 1761]; People v. Stroud (1969) 273 Cal.App.2d 670, 674, 682 [78 Cal.Rptr. 270].) We must examine 'all the surrounding circumstances -- both the characteristics of the accused and details of the interrogation." (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 226 [36 L.Ed.2d 854, 862, 93 S.Ct. 2041], quoted in People v. Hogan (1982) 31 Cal.3d 815, 841 [183 Cal.Rptr. 817, 647 P.2d 93].)" (People v. Adams, supra, 143 Cal.App.3d 970, 984.)

The ultimate question of "voluntariness" of a confession is a legal determination by the reviewing court of whether, under the totality of

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the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the constitution. (Miller v. Fenton (1985) 474 U.S. ____ [88 L.Ed.2d 405, 412].)

"A confession is involuntary whether coerced by physical intimidation or psychological pressure. [Citation.] Law enforcement conduct which renders a confession involuntary does not consist only of express threats so direct as to bludgeon a defendant into failure of the will. Subtle psychological coercion suffices as well, and at times more effectively, to overbear 'a rational intellect and a free will.' As the Supreme court noted in Malloy v. Hogan (1964) 378 U.S. 1, 7, '[w]e have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until

he confessed.' [Citations.]" (Emphasis added.) (United States v. Tingle (1981) 658 F.2d 1332, 1335.) "Confessions obtained by coercive practices which overcome the will of the person confessing are tainted, and both the confession and its products will be suppressed." (People v. Andersen (1980) 101 Cal.App.3d 563, 574.)

The burden is on the prosecution to show voluntariness. (People v. Jimenez, supra, 21 Cal.3d at p. 602.)[4/]

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4. There is a split of authority as to the burden of proof placed on the prosecution since the passage of Proposition 8 in establishing voluntariness. In People v. Jimenez, supra, 21 Cal.3d at page 608, the California Supreme Court held the prosecution must prove voluntariness of a confession beyond a reasonable doubt. The court subsequently held that standard applies equally to admissions by a defendant. (People v. Murtishaw, supra, 29 Cal.3d at p. 753.) The federal standard is proof by a preponderance of the evidence. (Lego v. Twomey (1971) 404 U.S. 477, 489.) The

The prosecution's burden of establishing that an accused's statements are voluntary is greater in the case of a juvenile than in the case of an adult.

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Footnote 4 continued:

question is whether after Proposition 8 the state or federal standard applies. In People v. Dingle (1985) 174 Cal.App.3d 21, 27 fn. 6, the court relying on Ramona R. v. Superior Court (1985) 37 Cal.3d 802, as well as the California Supreme Court's retransfer of a case, which had held the federal standard applied, for reconsideration in light of Ramona R. took the position that the California standard controls. In a more recent case, People v. Markham (1986) 179 Cal.App.3d 745, the court held that under California Constitution, article I, section 28, subdivision (d), the federal standard applies. The trial court here did not state which standard it was applying. We need not decide the correct standard, however, because the prosecution did not even establish voluntariness by a preponderance of the evidence. Defendant's statement was tape recorded and the evidence is uncontradicted. The police conduct unquestionably rendered defendant's statement involuntary for the reasons stated below.

(In re Gault (1967) 387 U.S. 1, 55; Gallegos v. Colorado (1962) 370 U.S. 49, 53-54; In re Abdul Y. (1982) 130 Cal.App. 3d 847, 862-863; People v. Alfieri (1979) 95 Cal.App.3d 533, 544-545.) The age of a minor is a factor to be weighed in determining the voluntariness of his confession. (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 226; Gallegos v. Colorado, supra, 370 U.S. at pp. 53-54; People v. Lara (1967) 67 Cal.2d 365, 385; People v. Alfieri, supra, 95 Cal.App.3d at p. 545.) So is the psychological impact of the questioning. (Schneckloth v. Bustamonte, supra, 412 U.S. at p. 226; Gallegos v. Colorado, supra, 370 U.S. at pp. 53-54; People v. Lara, supra, 67 Cal.2d at pp. 385-386; People v. Alfieri, supra, 95 Cal.App.3d at p. 545.)

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After defendant initially denied involvement and prior to obtaining any statement from him, Newman told defendant he and Detective Olson were primarily interested in defendant's welfare and he wanted them to become friends with defendant. He tried to minimize the significance of the shooting by untruthfully telling defendant it appeared from what others had told the police that it was just a crazy, spontaneous thing. He stated he and Olson were there to help Charles.

We find it inconceivable the police were there to help defendant in any way. They had already broken the case with an eyewitness and physical evidence; they were interrogating defendant primarily to obtain evidence to be used against him as to his mental state. Newman testified he told defendant he

wanted to know what defendant was thinking when this happened instead of trying to get the defendant to say he shot the officer. Defendant's eventual response, however, was not only an admission of involvement; it had monumental significance in terms of his culpability for first degree murder.

This type of "softening-up" and deception to induce a confession had been expressly disapproved by the courts as constituting improper pressure and alone requires reversal. (See People v. Honeycutt (1977) 20 Cal.3d 150, 158-161; People v. Adams, supra, 143 Cal.App.3d 970, 989.)5/

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5. In People v. Honeycutt, supra, 20 Cal.3d 150, at pages 160-161, the court held the defendant's decision to waive his rights under Miranda v. Arizona (1966) 382 U.S. 436 was involuntary, requiring reversal, because the waiver resulted from "a clever softening-up" of

Moreover, additional circumstances present here support our finding that defendant's confession was involuntary. The fact defendant was only 16 years old, combined with the fact he was introduced to the police by his father, himself a law enforecment official, rendered the minor particularly susceptible

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Footnote 5 continued:

the defendant "through disparagement of the victim and ingratiating conversation." Although Honeycutt involved preadvisement "softening-up" conversations, the same rationale which rendered the defendant's decision to waive his Miranda rights involuntary applies equally to render a confession involuntary when it results from the disapproved "softening-up" technique. (Cf. People v. Admas, supra, 143 Cal.App.3d at p. 989.) The court in People v. Adams, supra, 143 Cal.App.3d 970, 989, relied on People v. Honeycutt, supra, 20 Cal.3d at pages 158-161, to find the defendant's statements involuntairly given, whene elements of "softening-up," exploitation of friendship and deception were present in addition to other psychological coercion, including the police tactic of delving into a suspect's psyche to find some area of special vulnerability and then concentrating on it to extract admissions."

to the interrogator's feigned protestations of concern and promise to help. That the improper tactics used here in fact induced defendant to confess is attested to by defendant's response to an inquiry by Newman. When readmonished, after having admitted his involvement in the shooting and after having been told he could not go home, but would have to go to juvenile hall, defendant said, "I think I better get a lawyer." Newman then asked him, "have we made you any promises tonight at all to get you to talk about this;" Charles responded, "Ah, you said you was going to help me." "It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.]" People v. Jimenez, supra, 21 Cal.3d 595, 611.)

Considering all the surrounding circumstances, including defendant's characteristics and the details of the interrogation, we find defendant's confession was induced by improper psychological pressure and persuasion applied by the police, and particularly by their promise to help Charles. Accordingly, we conclude defendant's confession was involuntary as a matter of law and its

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admission into evidence constitutes reversible error.

The judgment is reversed.[6]

NOT TO BE PUBLISHED

Trotter/s/
TROTTER, P.J.

We concur:

Crosby/s/
CROSBY, J.

Soneshine/s/
SONESHINE, J.

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6. Because we reverse the judgment on the ground that defendant's statement were involuntary and inadmissible, we need not discuss defendant's remaining contentions.

APPENDIX B

APPENDIX B

[Filed September 11, 1986]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G001507

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

CHARLES TYBERG

Respondent's petition for review DENIED.

Mosk, Jr. and Lucas, Jr., are of the opinion the petition should be granted.

[signed] BIRD
Chief Justice

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
JOHN W. CARNEY
Supervising Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No: _____
October Term, 1986

PEOPLE OF THE STATE
OF CALIFORNIA,

Petitioner,

v.

CHARLES TYBERG,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within Petition for Writ of Certiorari as follows: To Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows, except where three copies are indicated:

Edwin L. Miller, Jr.
District Attorney
County of San Diego
P.O. Box X-1011
San Diego, CA 92112

Laurence P. Gill, Clerk
Supreme Court of California
350 McAllister Street, Suite 4050
San Francisco, CA 94102
(3 copies)

Clarence Haynes
611 Civic Center Drive West
Suite 200
Santa Ana, CA 92701

County Clerk
County of Orange
P. O. Box 838
Santa Ana, CA 92702
(Myron S. Brown, Judge)

Honorable John K. Trotter, Jr.,
P. J., Court of Appeal, Fourth
Appellate District, Division Three
600 West Santa Ana Boulevard
Santa Ana, CA 92701

Paul Bell
Appellate Defenders, Inc.
233 A Street, Suite 1310
San Diego, CA 92101
(3 copies)

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 8 day of October, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 8, 1986.

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 8th day of October.

Notary Public in and for said County and State

OFFICIAL SEAL
BRENDA J. LOCKE
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Exp Feb. 20, 1987

Supreme Court, U.S.
FILED
NOV 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 86 - 584

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CALIFORNIA,

Petitioner,

v.

CHARLES TYBERG,

Respondent.

RECEIVED
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ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION

APPELLATE DEFENDERS, INC.

Paul Edward Bell
Senior Staff Attorney

233 A Street
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Attorneys for Respondent

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No. 86 - 584

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CALIFORNIA,	)
	)
Petitioner,	)
	)
v.	)
	)
	)
CHARLES TYBERG,	)
	)
Respondent.	)
	)

BRIEF IN OPPOSITION

Respondent Charles Tyberg respectfully requests that this Court deny the State of California's petition for writ of certiorari seeking review of the unpublished opinion of the California Court of Appeal, Fourth District, Division Three.

STATEMENT OF ADDITIONAL FACTS

In addition to the facts stated in the petition, other circumstances of the interrogation of Charles Tyberg are relevant to the question of the voluntariness of the confession.

The petition notes that Charles Tyberg was arrested

at his home. (Petition, p. 12). The circumstances of that arrest were that at 6:15 a.m. on March 27, 1983, Charles' father, Sheriff's Sergeant James Tyberg[1] was interviewed at the Santee Sheriff's substation. The police seized his .357 magnum revolver and patrol car. Sergeant Tyberg then took the police to his home and woke up Charles saying, "Wake up, Charles, these men want to talk to you." Defendant was advised of his constitutional rights, but not questioned while at home. He was then taken to the police station and turned over to Detective Ron Newman. (Court of Appeal Opinion, reported at pages A-6 - A-7 in the appendix to the petition).

Petitioner's statement of facts accurately recites the representations then made by Newman to obtain the confession. (Petition, pp. 13-17). During that interrogation, at 8:33 a.m., Attorney Richard Songer called the San Diego Police Department and notified them he had been contacted by defendant's parents to talk with the minor before he made any statements. (Court of Appeal Opinion, page A-15 of the appendix to the petition). Songer was told the homicide division was "closed"; at a homicide sergeant's direction, the police operator lied to Songer, telling him no one in homicide was answering the phone. (Court's Pretrial Ex. 5, pp. 1-3). Songer left a message that he did not want any further questioning of his client until he had an opportunity to talk with him, and hung up to come to the police station. Various police employees, including the lieutenant on duty, then discussed how to stall him at the police sta-

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[1]The petition repeatedly and inaccurately refers to Sgt. Tyberg as Charles "stepfather." James Tyberg is Charles' father, as Charles is his adopted son. (Calif. Civil Code § 228).

tion. (Court's Pretrial Ex. 5, pp. 4-7).[2]

During the questioning Newman left the interview room to get a second tape recorder. When Newman returned to the interview room, he told the defendant he wanted to tape record his statement of what happened the night of the shooting (pretending he had not been doing so). Newman readvised defendant of his constitutional rights. When asked if he was willing to talk, Charles responded, "Ah, ah, I think I better get a lawyer." Newman asked ". . . have we made you any promises tonight at all to get to talk about this? Defendant replied, "Ah, you said you was going to help me." The interrogation concluded at 9:05 a.m. (Court of Appeal Opinion, pages A-14 - A-15 of the appendix to the petition).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION. "NON-COERCIVE" TACTICS, ARE, OF COURSE, PERMISSIBLE, BUT COERCIVE TACTICS ARE NOT.

The state has phrased the question presented as whether "officers may constitutionally employ non-coercive psychological tactics" in order to secure a confession. The answer to that question is obvious: officers may use non-coercive tactics to obtain a confession. But that question is not presented here: Charles Tyberg has never claimed, and the California Court of Appeal did not decide, that non-coercive tactics were prohibited. The California Court of

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[2]The trial court suppressed all statements made by defendant after Songer's call was received by police communications. The California Court of Appeal did not rely on

Appeal found that the particular tactics used here, including a representation that the officers were there to help, were coercive. The answer to the question of whether coercive psychological tactics may constitutionally be used to obtain a confession is, just as obviously, no.

The real question which was presented to the California Court of Appeal, and decided by that court, was whether or not the police representations that they were there to "help" a juvenile suspect who was introduced to them by his father, a law enforcement officer, had a psychologically coercive impact. That is an important question for this case, but it has no broad impact, because it is so specific to the facts of this case. And, as argued below, the voluntariness question was decided correctly by the Court of Appeal on the basis of California, as well as federal law. Certiorari should not be granted to decide the non-issue phrased as the "Question Presented" in the petition.

II.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL RESTS ON ADEQUATE STATE GROUNDS.

While the California Court of Appeal decision makes some reference to general federal principles that age of the minor and psychological impact of the questioning must be considered in reviewing the voluntariness of a confession, the major reliance of the opinion is on California state

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this conduct in finding the earlier part of the confession involuntary.

law. State law was an adequate and independent ground for the Court of Appeal decision. Citing exclusively to California cases, including People v. Honeycutt (1977) 20 Cal.3d 150, 158-161 [141 Cal.Rptr. 698, 570 P.2d 1050], the opinion recites the officer's false assurances and representation of help, and concludes: "This type of 'softening-up' and deception to induce a confession has been expressly disapproved by the courts as constituting improper pressure and alone requires reversal." (Opinion, p. A-26 of appendix to the petition.) Later, the opinion notes that Charles Tyberg relied on the officer's assurance of help in agreeing to talk, and quotes People v. Jimenez (1978) 21 Cal.3d 595, 611 [147 Cal.Rptr. 172, 580 P.2d 672] for the proposition that a confession is involuntary if it was elicited by any promise of benefit or leniency. (Opinion, p. A-28 of appendix to the petition.) People v. Jimenez establishes for California a stricter standard for the proof of voluntariness than is required by federal law. While the Court of Appeal opinion here did not find it necessary to rely on that stricter standard (See Opinion, ftn. 4, pp. A-22 - A-23 of the appendix to the petition), its reliance on Jimenez' substantive holding is a clear statement that the court was independently relying on California law. This opinion contains the "plain statement" that the decision rests upon adequate and independent state grounds which is required by Michigan v. Long (1983) 463 U.S. 1032, 1042. Citation to a state case which itself sets a higher standard than federal law requires for the protection of the privilege against self-incrimination is one of the plainest ways a court can indicate its reliance on state law.

Miranda v. Arizona (1966) 384 U.S. 436 and Miller

v. Fenton (1985) __ U.S.__ [88 L.Ed.2d 405; 106 S.Ct. 445], are cited in the opinion for their broad general principles. Every other citation of a federal case is either followed by the citation of one or more California cases independently standing for the same principles, or is a part of a long quotation from a California case. Nowhere does the opinion place any significant reliance on federal law. This use of the federal cases indicates they are being used only for the purpose of guidance, and do not themselves compel the result the court has reached. (See Michigan v. Long, supra, 463 U.S. at 1041).

Nor can there be any claim here that the California constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. It is settled law that the California Constitution contains an independent privilege against self-incrimination which provides greater protection to the individual than is required by the Federal Constitution. (Ramona R. v. Superior Court (1985) 37 Cal.3d 802, 809-810 [210 Cal.Rptr. 204, 693 P.2d 789]; People v. Navarez (1985) 169 Cal.App.3d 936, 945, [215 Cal.Rptr. 519]).

Therefore, the California Attorney General has failed to demonstrate that there is a federal question presented here, and certiorari should be denied.

III.

WHATEVER THE POTENTIAL ISSUES OF POLICE TRICKERY WHICH MAY SOMEDAY BE PRESENTED TO THIS COURT, A REPRESENTATION THE POLICE ARE THERE TO "HELP" A JUVENILE SUSPECT BY INTERROGATING HIM IS OBVIOUSLY COERCIVE. THIS CASE INVOLVES NONE OF THE DIFFICULT QUESTIONS.

The California Attorney General attempts to describe this case as one involving subterfuge and trickery, but not such subterfuge and trickery which would cause an innocent person to confess. The petition goes on to discuss some of the difficult issues which can be presented by police trickery during interrogation, and therefore claims this is an appropriate case for this Court's review. (Petition, pp. 21-27). But none of those difficult issues are presented here. The police here used various forms of lying to Charles Tyberg to obtain the confession, and those were properly considered by the California Court of Appeal in its review of the totality of the circumstances. But the primary reason for the finding of involuntariness was the officers' representations that they were there to "help." As established in prior decisions by this Court, any offer of "help," even if it were genuine, would be coercive, and of course here it was not genuine.

In Leyra v. Denno (1954) 347 U.S. 556 a police psychiatrist's claim, "I want to see if I can help you" when his real purpose was to get a confession was one of the factors making not only that confession but also subsequent confessions inadmissible under the traditional, pre-Miranda voluntariness standards. A confession is not free and voluntary unless the suspect understands the adversary role

of the person to whom he is confessing. Whether the person is a psychiatrist or a police officer, a suspect is not going to understand that adversary role if the interrogator says he is there to help.

Similarly in Spano v. New York (1959) 360 U.S. 315, 323 [3 L.Ed.2d 1265; 79 S.Ct. 1202] this Court found that one important factor in its conclusion a confession was involuntary was the use, during the interrogation, of a police officer who had been a childhood friend of the defendant's. So this Court has dealt with the issue of "non-specific offers of aid": such offers are an important factor in finding a confession involuntary. The California Court of Appeal opinion here is an application of this existing law to these facts: the case presents no new issues of law for this Court's determination.

Nothing in Miller v. Fenton, (3rd Cir., 1986) 796 F.2d 598[3] relied on by the California Attorney General, changes this existing law. In Miller, the court recognized that excessive friendliness could well cause a suspect to forget his questioner had an adversarial role, but concluded that because Mr. Miller was a mature man who made remarks indicating he knew this was an ordinary police interrogation, that danger had not occurred. This case is readily distinguishable: Charles Tyberg was not a mature man, but a sixteen-year-old boy on the day he was questioned. Far from indicating he knew this was an ordinary police interrogation, Charles Tyberg asked permission to go home with his father after he confessed (See petition, pp. 17-19), and concluded the interview by stating, "Ah, you said you were

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[3]A petition for certiorari was pending in the Miller case at the time this brief in opposition was prepared. The June 1986 opinion discussed here is the Court of Appeals' opinion

going to help me." The offer of help here did have an overbearing effect on Charles Tyberg's will.

Miller v. Fenton also has no bearing on whether review should be granted here because of its entirely different procedural posture. That case was a collateral attack on a New Jersey state conviction: the habeas corpus petitioner had the burden of proving involuntariness by a preponderance of the evidence. This case arises on direct review of a state judgment: the prosecution has the burden of proof of voluntariness. (See Opinion, footnote 4, pp. A-22 - A-23 of appendix to the petition.) Because of the factual differences, it is doubtful that Miller v. Fenton conflicts with the decision here, but even if there were a conflict, it would be between New Jersey and California law. As long as the law of both states complies with the minimum requirements of the United States Constitution, any conflict is a permissible difference between the law of different states, and it would not be appropriate or necessary for this Court to review it.

A factually closer case is Woods v. Clusen (7th Cir., 1986) 794 F.2d 293, where habeas corpus relief was granted to a petitioner whose confession was obtained by a combination of lies and fatherly overtures, during an interrogation occuring when he was 16 years of age. Woods v. Clusen reaffirms the well-established principle that when juveniles are involved, great care must be taken to assure their admissions are voluntary, citing Haley v. Ohio (1948) 332 U.S. 596. Haley v. Ohio is important for another part

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on the voluntariness question rendered after this Court's 1985 decision remanding the case for further proceedings.

of its holding that is relevant to this case: police refusal to let an attorney see a juvenile in custody is relevant to the evaluation of voluntariness, even when the police conduct occurs after the confession is obtained. The California Court of Appeal did not need to even consider this factor in its decision, but it must be included in any overall review of the totality of the circumstances here.

This case turns on its unique facts, involving no broad holding, which is why the opinion is not published.[4] Each of the various factors considered by the California Court of Appeal is a proper factor in the voluntariness equation, and therefore there is no reason to grant certiorari in this case.

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[4]Rule 976(b) of the California Rules of Court specifies the standards for publication of Court of Appeal opinions:

> No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:
>
> (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> (2) resolves or creates an apparent conflict in the law;
>
> (3) involves a legal issue of continuing public interest; or
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> (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

CONCLUSION

The petition here does not raise an important federal question; because the decision below is based on an adequate and independent state ground, it raises no cognizable federal question at all. The petition for writ of certiorari should be denied.

DATED: November 3, 1986

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Paul Edward Bell

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